

**FREEDOM OF SPEECH VS. THE RIGHT OF PUBLICITY IN TODAY'S  
GAMING WORLD**

**ARTICLE**

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Introduction.....	246
I. The Players .....	247
A. Sam Keller .....	247
B. NCAA .....	247
C. Collegiate Licensing Company (CLC) .....	247
D. Electronic Arts Sports (EA Sports) .....	248
II. Plaintiffs' Allegations .....	248
III. Defendant's Allegations.....	248
A. Players gave up the rights to the use of their images .....	248
B. Product is protected under the First Amendment .....	248
IV. The Keller Controversy Today .....	249
V. Freedom of Speech .....	249
A. Protection under First Amendment .....	249
B. Campbell v. Accufe-Rose Music, Inc. ....	249
C. Cardtoons L.C. v Major League Baseball Players Association.....	250
VI. Right of Publicity.....	251
A. Historical overview.....	251
1. Haelean Laboratories Inc. v. Topps Chewing Gum.....	251
B. William Prosser's Article.....	252
1. California's Right of Publicity Statute .....	252
2. Comedy III Productions Inc. v. Saderup.....	253
VII. Right of Publicity vs. Freedom of Speech .....	254
A. Zacchini v. Scripps-Howard Broadcasting Co. ....	254
VIII. The Student-Athlete Agreement .....	255
A. Form o8-3a analyzed .....	255
1. Adhesion contracts.....	256
IX. Analysis of The Keller Controversy .....	256
A. The Tim Tebow Example.....	257
B. Uploading Team Rosters.....	259
Conclusion .....	260

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Finding the proper balance is  
sometimes a very difficult job.  
There is no neatly packaged general  
rule that can be waved like a magic  
wand to make the solution any easier.  
The balance must be laboriously  
hacked out case by case.  
-Thomas J. McCarthy<sup>1</sup>

## INTRODUCTION

**T**HIS INVESTIGATION IS INSPIRED BY A CONTROVERSY THAT HAS RISEN FROM A class action suit brought by ex-collegiate football player, Sam Keller, in 2009, against the National Collegiate Athletic Association (NCAA), the Collegiate Licensing Company (CLC) and Electronic Arts Sports (EA Sports). This is a classic First Amendment publicity rights case and there is no clear doctrine, either from state or federal jurisprudence, which can be used to determine whether plaintiffs or defendants will come out on top. On one end lays the Freedom of Speech protection established in the United States Constitution's First Amendment, and at the other is the right of publicity protection that has been developed in both state jurisprudence and statutes. Some questions immediately come to mind. What are the legal policies behind these principles? Should collegiate student-athletes know what rights they give up when they sign agree to represent their college or university? Perhaps the most important question of all: should a third party be allowed to make billions of dollars using another's image or likeness? All of these questions will be addressed in this article at some point.

The overall view is that EA Sports has utilized everything but the players' names (this is debatable, as we will see) when developing, manufacturing and selling videogames. It is an advertising strategy that attracts millions of consumers to buy or use its products. A person playing a NCAA Football videogame does not pick the University of Florida team because they like its uniforms. Instead, the person, more likely than not, picks that team because they will be able to use Tim Tebow, with all of his real life physical attributes, in order to beat other teams.<sup>2</sup>

This article presents a view of the legal framework that has been developed in the United States regarding the right of publicity and the First Amendment protections on freedom of speech. First, it discusses the main parties involved in the controversy that will be referred to as the Keller Controversy. The following sections explain the basis of the plaintiff's allegations and the defendant's coun-

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<sup>1</sup> 2 THOMAS J. MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 8:39 (2d ed. 2011).

<sup>2</sup> The Tim Tebow Example is further discussed in Section IX. See *infra* Sec. IX.

ter propositions. Following that, there is a brief update on the most recent developments in the Keller Controversy. The next three sections are dedicated to a discussion on the development of doctrines that are essential for the legal analysis: the protection provided by the First Amendment, the right of publicity, and the clash between these two rights. There is an in depth analysis of the Keller Controversy and the applicable doctrines based on the factual background of the case. Lastly, a conclusion will summarize the most essential findings derived from the investigation.

## I. THE PLAYERS

### A. Sam Keller

Sam Keller is a former Arizona State football player (quarterback) who later transferred to the University of Nebraska and is featured in EA Sports's NCAA Football videogame. He filed a class action suit against NCAA, CLC and EA Sports for violations to the Sherman Antitrust Act, Section 1, and for violations of antitrust laws, right of publicity laws under California State Statutes, and NCAA rules and regulations. For purposes of the investigation I will confine the analysis to the cause of action presented under the right of publicity laws and doctrine.

### B. NCAA

The NCAA's purpose, as stated in their official webpage, is to "govern competition in a fair, safe, equitable and sportsmanlike manner, and to integrate intercollegiate athletics into higher education so that the educational experience of the student-athlete is paramount".<sup>3</sup> Every prospective and active student-athlete must abide by the rules and regulations of the NCAA in order to represent their college or university in a given sport.

### C. Collegiate Licensing Company (CLC)

□ The CLC is a marketing company that provides licensing of NCAA events, such as bowl games and products, to third parties. In 2005, the CLC entered into an exclusive contract with EA Sports for the development and distribution of interactive NCAA football and basketball games. This license allows EA Sports to identically replicate teams, stadiums, uniforms and mascots.

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<sup>3</sup> NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, (May 25,2011) <http://www.ncaa.org/wps/wcm/connect/public/ncaa/about+the+ncaa>.

#### *D. Electronic Arts Sports (EA Sports)*

EA Sports is the world's leading independent developer and publisher of interactive gaming entertainment software. The agreement with CLC has helped EA Sports rise to the top of its industry. It has produced billions in net revenues over the years.

### **II. PLAINTIFFS' ALLEGATIONS**

Sam Keller and other student-athletes argue that EA Sports has knowingly and intentionally utilized the names and likenesses of the class action members in videogames that were developed, manufactured and sold by EA Sports without their consent.<sup>4</sup> They also contend that EA Sports used the Keller and class members' names and likenesses for advertising, selling and soliciting purchases of their videogames such as NCAA Football, NCAA Basketball and NCAA March Madness. This misappropriation of their publicity rights has resulted in injury to Keller and class members. The allegations set forth in the Keller case took place in EA Sports's headquarters in Redwood, California.<sup>5</sup>

Under California Law, a person's image is protected from being utilized by another party without consent and for commercial exploitation. The infringer that causes injury to the first will be liable for damages, lost profits and beneficial gains of the latter.

### **III. DEFENDANT'S ALLEGATIONS**

#### *A. Players gave up the rights to the use of their images*

The defendants, specifically EA Sports, contend that the student-athletes essentially gave up their right of publicity by signing NCAA Form 08-3a, thus granting the NCAA the exclusive right to license the images to third parties.<sup>6</sup> Consequently, EA Sports entered into an agreement with the CLC and obtained a license in order to use the images property of the NCAA.

#### *B. Product is protected under the First Amendment*

EA Sports also argues that they did not use the student-athletes' names or likeness in the development, manufacture or distribution of the NCAA Football videogames. The defendant's theory is that the development, manufacture and

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<sup>4</sup> In Re: NCAA Student-Athlete Name & Likeness Litigation, No. C 09-1967 CW 2011 WL 1642256 (D. N.D. Cal. May 2, 2011).

<sup>5</sup> EA SPORTS, (October 19, 2011) <http://www.ea.com/2/about-ea>.

<sup>6</sup> I will further discuss the contents of Form 08-3a in Section VIII.A. See *infra* Sec. VIII.A.

sales of NCAA Football, Basketball, and March Madness videogames have transformed the images in such way that it does not infringe on the student-athletes' right of publicity. They claim that Freedom of Speech under the First Amendment protects them based on the transformative use doctrine.

#### IV. THE KELLER CONTROVERSY TODAY

The Keller Controversy has been consolidated with the *O'Bannon* case and is now being reviewed as *In Re: NCAA Student-Athlete Name & Likeness Licensing Litigation*.<sup>7</sup> The case is being evaluated by the United States District Court for the Northern District of California, Oakland Division. All of the defendants have filed motions to dismiss the claims brought against them, but the District Court denied the right of publicity claim dismissal. The decision was appealed in the United States District Court of Appeals for the Ninth District and a decision is pending. It would not be surprising that, given the high interest created by this controversy has and the importance of the development of a clearer legal standard, this case be eventually resolved by the United States Supreme Court.

#### V. FREEDOM OF SPEECH

##### A. Protection under First Amendment

The First Amendment protects the freedom of speech and expression in the United States. It fully protects expressive speech, such as political speech, journalism, artistic, and fictional works. But the protection for commercial speech, which is work that is intended for financial gain, is not as comprehensive. Today, with the vast advancements in technology, the use of images, sounds and textual contents has proven to be a challenge to the courts when balancing how far they are willing to go in order to offer that protection. Yet without this protection, it would be difficult for creators, artists and entertainers to preserve their motivation to come up with the ideas and expressions such as those that have propelled the arts and sciences in our society.

##### B. *Campbell v. Accufe-Rose Music, Inc.*

In *Campbell v. Accufe-Rose Music, Inc.*,<sup>8</sup> the United States Supreme Court used the transformative use approach to suggest that a piece of artistic work, even if it is based on a previous piece, can be varied in such way that the author would not be liable for infringing on the earlier work. The case involved the in-

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<sup>7</sup> The *O'Bannon* case involves former NCAA basketball player Ed O'Bannon who had also filed a suit against the NCAA, CLC and EA Sports for using images of him when he played for the UCLA Bruins basketball team. *In Re: NCAA*, 2011 WL 1642256.

<sup>8</sup> *Campbell v. Accufe-Rose Music, Inc.*, 510 U.S. 569 (1994).

famous rap group 2 Live Crew and their adaptation of Roy Orbison's rock ballad *Oh Pretty Woman*. The 2 Live Crew took elements of that previous work and produced a parody called *Pretty Woman*. The case gained publicity because the 2 Live Crew was notorious for their explicit language and *in-your-face* style despised by many conservative Americans.

The Supreme Court suggested that the 2 Live Crew's type of work could be considered to be transformative if it could be established that it added a "new expression, meaning or message" to the earlier work.<sup>9</sup> It also stated, citing *Sony Corp. v. Universal Studios*,<sup>10</sup> that "[a]lthough such transformative use is not absolutely necessary for a finding of fair use,"<sup>11</sup> "the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works".<sup>12</sup> In doing so the Court was upholding a lenient legal policy that would not limit an artist's creativity, in doing so it recognizes the magnitude and importance of artistic works in the United States society. I find this approach logical for the development of the arts; it is interesting and I must agree with the Court's finding because it protects an artist's work, even when its consequences could result disturbing to a certain majority group. This follows the doctrine set forth years ago by Justice Holmes in *Bleinstein v. Donaldson Lithographing Co.*<sup>13</sup>

#### C. *Cardtoons L.C. v Major League Baseball Players Association*

In 1996, the United States Court of Appeals analyzed the First Amendment freedom of speech rights of *Cardtoons L.C.*, a company that created cartoonish parodies of Major League Baseball (MLB) players and printed them in baseball trading cards without their expressed consent. On the other end of the controversy, the Court had to address the player's right of publicity over their images.<sup>14</sup> The players alleged that *Cardtoons* had violated their right of publicity by using the MLB players' images without their consent, while *Cardtoons* contended that the cards were parodies and deserved to be protected under the First Amendment. The Court balanced the value of speech and the justifications of the right of publicity and eventually decided that *Cardtoons* was in deed protected. In doing so it concluded that:

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<sup>9</sup> *Id.* at 570.

<sup>10</sup> *Sony Corp. v. Universal Studios* 464 U.S. 417 (1984).

<sup>11</sup> *Campbell*, *supra* note 8, at 579.

<sup>12</sup> *Id.*

<sup>13</sup> See *Bleinstein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903) (in which the Court expressed that "[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.").

<sup>14</sup> *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959 (1996).

The justifications for the right of publicity are not nearly as compelling as those offered for other forms of intellectual property, and are particularly unpersuasive in the case of celebrity parodies. The cards, on the other hand, are an important form of entertainment and social commentary that deserve First Amendment protection.<sup>15</sup>

The Court thus parted ways with the transformative use doctrine. The key element of this decision was that, by valuating the freedom of speech and the publicity rights, it avoided the headaches that come with the transformative use doctrine. This reaffirms the policy that protects and promotes the creativity needed for the evolution of the artistic industry.

We have seen two approaches to the protection of an artist's freedom of speech in the context of a transformative work and when being weighed against an individual's right to his or her image. These developments will help us evaluate the Defendant's allegations of their use of the student-athletes' images in the creation of the videogames.

## VI. RIGHT OF PUBLICITY

### A. Historical overview

#### 1. Haelan Laboratories Inc. v. Topps Chewing Gum

In 1953, the Court of Appeals for the Second Circuit first recognized the right of publicity in *Haelan Laboratories, Inc. v. Topps Chewing Gum*.<sup>16</sup> The case considered whether a Major League Baseball (MLB) player had a property right to his images that were being used in baseball trading cards. The Court described the right of publicity as follows:

[A] man has a right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture, and that such a grant may validly be made 'in gross,' i.e., without an accompanying transfer of a business or of anything else. Whether it be labelled a 'property' right is immaterial; for here, as often elsewhere, the tag 'property' simply symbolizes the fact that courts enforce a claim which has pecuniary worth.<sup>17</sup>

This conclusion has motivated many famous and infamous characters to pursue the protection of their images. Following this decision the search for that protection has become increasingly important with the development of means to obtain access to an array of images with little difficulty. It set the basis for the controversies that we see in today's modernized society. There is no question

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<sup>15</sup> *Id.* at 976.

<sup>16</sup> *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (1953).

<sup>17</sup> *Id.* at 868.

that famous personalities, including recording artists, movie stars and athletes captivate the audience's attention, and this represents an enormous opportunity for financial gain if exploited the right way.

### *B. William Prosser's Article*

In 1960, William Prosser wrote perhaps the most important article on the right of publicity. Courts continue to cite his article up to this date when faced with controversies that arise from claims of the right of publicity. Prosser's analysis revolves around the right of privacy, christened by Cooley as the *right to be let alone*.<sup>18</sup> Prosser further discussed what have become the pillars for publicity rights protection describing the following four torts:

1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.
2. Public disclosure of embarrassing private facts about the plaintiff.
3. Publicity which places the plaintiff in a false light in the public eye.
4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.<sup>19</sup>

Prosser's fourth tort is at the core of right of publicity claims because, by definition, these types of claims involve one party utilizing the image or likeness of another in order to derive some sort of benefit. This principle is not an absolute one for there could be other rights that are considered to have higher hierarchical value, for example, the protection of freedom of speech. After all, that is precisely what this investigation is evaluating.

#### 1. California's Right of Publicity Statute

The state of California introduced the Right of Publicity Statute that is found in the Section 3344 of the California Civil Code and contains the following dispositions:

(a) Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent, or, in the case of a minor, the prior consent of his parent or legal guardian, shall be liable for any damages sustained by the person or persons injured as a result thereof. In addition, in any action brought under this section, the person who violated the section shall be liable to the injured party or parties in an amount equal to the greater of seven hundred fifty dollars (\$750) or the actual damages suffered by him or her as a result of the unauthorized use, and any profits from the unau-

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<sup>18</sup> 1 THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENTLY OF CONTRACT § 135 (D. Avery Haggard ed., Callaghan & Company 1932) (1879).

<sup>19</sup> William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960).



thorized use that are attributable to the use and are not taken into account in computing the actual damages. In establishing such profits, the injured party or parties are required to present proof only of the gross revenue attributable to such use, and the person who violated this section is required to prove his or her deductible expenses. Punitive damages may also be awarded to the injured party or parties. The prevailing party in any action under this section shall also be entitled to attorney's fees and costs.<sup>20</sup>

This statute makes it clear that the California legislature recognizes the importance of protecting the right of publicity of individuals. The statute is also very specific on the remedies that a plaintiff could be awarded if it is found that his right has been violated. It is not surprising that California has enacted such a law given the fact that it is the epicenter of the entertainment business in the United States. I will further discuss the relevance of this statute when analyzing the Keller Controversy.

## 2. Comedy III Productions Inc. v. Saderup

In 2001, the California Supreme Court first integrated the transformative use doctrine in the right of publicity case *Comedy III Productions v. Saderup*.<sup>21</sup> It did so by analyzing whether Saderup's work was protected under the First Amendment of the United States Constitution. He used the image of the *Three Stooges* on t-shirts and lithographs that he later sold for a profit. In analyzing the artist's work the Court asked itself "whether a product containing a celebrity's likeness is so transformed that it has become primarily the defendant's own expression rather than the celebrity's likeness."<sup>22</sup> It also added that "[a]n artist depicting a celebrity must contribute something more than a merely trivial variation, but create something recognizably his own, in order to qualify for legal protection."<sup>23</sup> In order for an individual to obtain the protection provided by the First amendment the Court expressed that the challenged work is protected "inasmuch as it contains significant transformative elements or that the value of the work does not derive primarily from the celebrity's fame."<sup>24</sup> This decision gives us an insight on how the California judicial system might approach controversies that arise in First Amendment publicity right controversies.

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<sup>20</sup> CAL. CIV. CODE § 3344 (a) (West 1997 & Supp. 2011)

<sup>21</sup> *Comedy III Productions, Inc. v. Gary Saderup, Inc.* 21 P.3d. 797 (2001).

<sup>22</sup> *Id.* at 809.

<sup>23</sup> *Id.* at 810-11 (citing *L. Batlin & Son, Inc. v. Snyder*, 2d Cir.1976, 536 F.2d 486, 490).

<sup>24</sup> *Comedy*, 21 P.3d. 797 at 810.

## VII. RIGHT OF PUBLICITY VS. FREEDOM OF SPEECH

### A. *Zacchini v. Scripps-Howard Broadcasting Co.*

In 1977, the United States Supreme Court delivered a decision regarding a claim on the right of publicity and protection under the First Amendment; the only one of its kind to this date. In *Zacchini v. Scripps-Howard Broadcasting Co.*, the Court found that a local television station had violated Zacchini's right of publicity by broadcasting his entire human cannonball act on the evening news without his permission.<sup>25</sup> Even after this decision, it is not yet entirely clear how lower courts should evaluate publicity rights versus First Amendment controversies.

The majority of the Court adopted the entire act doctrine in holding that "[t]he broadcast of a film of petitioner's entire act poses a substantial threat to the economic value of that performance . . . . [T]his act is the product of petitioner's own talents and energy, the end result of much time, effort, and expense. Much of its economic value lies in the 'right of exclusive control over the publicity given to his performance' . . . ."<sup>26</sup> The Court also recognized that Zacchini's "state-law right of publicity would not serve to prevent respondent from reporting the newsworthy facts about petitioner's act."<sup>27</sup>

This is a particular case given the fact that the Court analyzed the controversy using the entire act test because the transmission included *all* of Zacchini's performance. This assumption, however, might be questioned: Where do we leave the preparation, advertisement and production of this performance? It could be argued that Zacchini's entire performance included other factors that were not included in the television broadcast. It would be interesting to see if, even assuming the latter, the Supreme Court would have rendered a similar result.

The balancing of the First Amendment protection and publicity rights is no easy task, but it is certain that, given the right circumstances, the Supreme Court would be willing to uphold the right of publicity against the freedom of speech protection. The entire act test was enough to get a majority vote in this case but its application has proven to be challenging, and the Supreme Court has not applied it in a First Amendment publicity case ever since.<sup>28</sup>

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<sup>25</sup> *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977).

<sup>26</sup> *Id.* at 575 (footnote omitted).

<sup>27</sup> *Id.* at 574 (footnote omitted).

<sup>28</sup> Gloria Franke, *The Right of Publicity vs. the First Amendment: Will One Test Ever Capture the Starring Role?*, 79 S. CAL. L. REV. 945 (2006).

## VIII. THE STUDENT-ATHLETE AGREEMENT

### A. Form o8-3a analyzed

Every student-athlete must sign Form o8-3a before he or she even thinks of stepping foot on a court or field.<sup>29</sup> This form constitutes a contract between the student-athlete and the NCAA. There is no negotiation in the process, the athlete either signs it or he will not be able to represent his or her college or university.

Part IV of this agreement contains a clause in which the student-athlete gives up the right to use of his or her name and/or picture.<sup>30</sup> But this waiver is conditioned, the NCAA or a third party is allowed to use a student-athlete's name and/or picture "to generally the promote NCAA championships or other NCAA events, activities or programs."<sup>31</sup> This statement reflects the following NCAA Bylaw: "[t]he NCAA [or a third party acting on behalf of the NCAA (e.g., host institution, conference, local organizing committee)] may use the name or picture of an enrolled student-athlete to generally promote NCAA championships or other NCAA events, activities or programs."<sup>32</sup>

There are two components in Part IV of form o8-3a that must be discussed. First, it is not clear if this agreement expires upon the student-athlete's graduation or if the images taken during his or her tenure are property of the NCAA even after the student-athlete has graduated, or has simply decided not to continue his or her academic-athletic career. This could be an important factor when it comes to right of publicity claims because a student-athlete's career is at most five or six years long but the images captured during such career could last a lifetime. Second, we must point out the ambiguity of the terms set forth in the clause. What does it mean to *generally promote NCAA championships or other NCAA events, activities or programs*? It would seem reasonable to see an image of a player used in a promotional campaign for a certain championship as safe use, this is ultimately how the NCAA gets larger audiences to attend or watch a televised broadcast. But analyzing this clause within the context of the Keller Controversy, it seems that EA Sports is stretching the terms in order to justify their use of student-athlete's images. They could be considered a third party, but there is no direct relationship between the production and distribution of videogames and the promotion of NCAA championships, events, activities or pro-

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<sup>29</sup> National Collegiate Athletic Association, *Form o8-3a: Student-Athlete Statement – Division I*, [http://www.ukathletics.com/doc\\_lib/complianceo8o9\\_sa\\_statement.pdf](http://www.ukathletics.com/doc_lib/complianceo8o9_sa_statement.pdf).

<sup>30</sup> *Id.* at Part IV.

<sup>31</sup> *Id.*

<sup>32</sup> NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, 2011-2010 NCAA DIVISION I MANUAL 72 (2011), available at <http://www.ncaapublications.com/p-4224-2011-2012-ncaa-division-i-manual-august-2011.aspx>.

grams. Both of these components must be considered when determining whether EA Sports has obtained a valid license of the right to student-athlete's images.

#### 1. Adhesion contracts

Black's Law Dictionary defines an adhesion contract as "[a] standard-form contract prepared by one party, to be signed by another party in a weaker position, usu[ally] a consumer, who adheres to the contract with little choice about the terms."<sup>33</sup>

Form o8-3a should be analyzed taking this definition into consideration. First, the NCAA is the party that prepares the contract and presents it to potential student-athletes. Second, the student-athlete, though not a consumer, is definitely in a weaker position because his future intercollegiate sporting career depends on he or she signing the agreement. Third, there is no say from the student-athlete's position as to the terms of the contract. I am not suggesting that this contract is not valid, but the interpretation of the agreement should favor the weaker party all other factors held equal.

### IX. ANALYSIS OF THE KELLER CONTROVERSY

There is only one question left to answer: does the right of publicity protect Sam Keller and other student-athlete's images and/or names from being used in EA Sports' games? There is obviously no clear-cut answer to this dilemma; the freedom of speech protection of the defendants and the agreement between the student-athletes and the NCAA should be weighed against the right of publicity. A number of courts that have tried to provide us with a test in order to solve these types of controversies, but no bright line rule has been established. The discussion of the Keller Controversy must be done taking all of the available legal doctrine and the relevant statutes in order to suggest what may be the end result.

First, it is tough to concede that, when an athlete signs Form o8-3a, he or she is giving up his or her publicity rights to the NCAA, and consequently to the CLC, thus consenting to the license of their images to EA Sports. Videogames can be entertaining and they are indeed very popular. For some, videogames could be considered positive for intercollegiate sports because they are able to reach a greater audience. But it seems that under this pretext EA Sports has parted from "generally promot[ing] NCAA events, championships, activities or programs."<sup>34</sup> EA Sports seems to use the student-athlete images to promote their videogames, giving them an exclusive edge, thus dominating the sports and athletic gaming markets. Furthermore, this agreement is ambiguous and places the

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<sup>33</sup> BLACK'S LAW DICTIONARY 366, (9th ed. 2009).

<sup>34</sup> National Collegiate Athletic Association, *supra* note 29.

student-athlete in a vulnerable and weak position, for he or she probably has little idea of the actual consequences of signing. Also, the fact that a student-athlete must sign that agreement in order to be eligible for competition must be highlighted. Many of these young athletes have been training for long periods of time before entering a college or university and competing at the collegiate level is at the top of their priorities, not signing is not an option.

Second, it is imperative to discuss the actual production of EA Sports videogames based on the transformative use doctrine and the freedom of speech protection under the First Amendment. Throughout the years, EA Sports has developed technologically advanced life-like videogame graphics that closely resemble the real images captured and seen through a television broadcast of a game. The company does not deny that this is their goal, this is what attracts the consumers to their products in the first place. But the important question to ask is whether they have created a work that can be differentiated from the individual's right of publicity

The following example provides a visual framework for analysis by comparing a real life image and an image taken from a NCAA Football videogame; it is dubbed the *Tim Tebow Example*.<sup>35</sup> The likeness between the images produced in the videogames and the actual images of student-athletes are evident and uncontestable.

*A. The Tim Tebow Example*



Exhibit A<sup>36</sup>



Exhibit B<sup>37</sup>

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<sup>35</sup> The selection of this player is solely for argument purposes; he is not a party in the Keller Controversy, yet he is one of the most famous collegiate football players in recent history.

<sup>36</sup> Picture: Tim Tebow (on file with author).

<sup>37</sup> Picture: EA Sports' NCAA Football match (on file with author).

Tim Tebow is a former University of Florida football player who helped his team win two National Championships, won the Heisman Trophy and is now playing in the National Football League (NFL).<sup>38</sup> Tebow has been featured in EA Sports' NCAA Football videogames, just like the plaintiffs in the Keller Controversy.

The first image presented above is a photograph of Tebow while he played at the University of Florida (Exhibit A) and the other a still picture from an EA Sports NCAA Football videogame (Exhibit B). Taking a close look at the images provided, certain attributes provide grounds for an analysis under the transformative use test described in section V.

The uniform's color, logo and team names are practically identical in both images, and it is reasonable to think that the University of Florida licensed them to EA Sports in a proper manner. But smaller and more specific details are pertinent for the transformative use analysis. First, the similarity of the facemask (face protector) in both images must be emphasized. Facemask selection is a prerogative of the player who will try to maximize his peripheral vision without giving up the safety a faceguard provides. There are numerous options when it comes to faceguards, yet Tebow selected the one seen in Exhibit A; it is not surprising that, in Exhibit B, EA Sports used the exact same faceguard. Second, the jersey number in both exhibits is fifteen (15). Numbers are used or placed on jerseys so players on the field are easily identifiable and are usually featured in the front, back and shoulders of football jerseys. This would be yet another way of identifying Tebow when playing the NCAA Football videogame. Third, there is a clear similarity in the technique Tebow uses while carrying the football; in both Exhibits we see the player using the left hand to hold the ball, which is indicative that the player is left handed, just like Tim Tebow in real life. Fourth, the wristband on the player's right forearm in both images is a particular type used by quarterbacks. These specialized wristbands have a window where a card containing plays can be placed and makes it easier for the player to call the play being signaled by the coaches from the sideline. After taking all of this elements into account, it is not easy to find a use that is transformative; it actually seems that EA Sports is trying its best to replicate the real life Tim Tebow.

This is but one example of the similarities between the student-athlete images and their video game counterparts that EA Sports replicates in their product. If one were to examine other football players, or even basketball players, the conclusion would be the same: the games are spot on with the representation of NCAA student-athletes.

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<sup>38</sup> The Heisman Trophy is awarded each year to the best football player in the NCAA Division I. The selection is made by a committee composed of coaches and experts. Tim Tebow was honored with this coveted award in his sophomore year.

### *B. Uploading Team Rosters*

The EA Sports NCAA Football videogames have a feature that could weigh heavily against their favor. The videogame platform allows users to upload the names of the players on a team roster. In doing so, the names of the student-athletes will appear on the back of the jerseys in the videogame itself. Furthermore, these videogames have a feature where announcer voices and dialogs comment real-time on the user's game play (audible through speakers), and these are portrayed in a similar fashion to actual announcer comments from intercollegiate events when broadcasted through television stations. If the videogame user has not uploaded a team's roster, the announcer will refer to the players by their jersey number, but if the team roster is uploaded, the announcer will actually use the player's last name.

EA Sports contends that the team rosters are provided by a third party and this should free them from responsibility. This is inexcusable; EA Sports could argue that they do not use the student-athletes' likeness, which, in turn, is questionable, given the similarities described above, but the development of a platform that allows these type of uploads should be taken as a deliberate usage of the players' likeness. This adds to the elements that make the videogame seem like a replica of the real life images and likeness of the student-athletes rather than a transformed adaptation.

It has been established that there is a protection under the First Amendment for work that is considered to add a "new expression, meaning or message" to an earlier work, as discussed in the transformative use section.<sup>39</sup> EA Sports could try to anchor its allegation on the fact that they are creating a videogame that does not constitute the use of the student-athlete's images or likeness under this doctrine. But this might prove to be an uphill battle. The similarities in the images, which have been pointed out, adding the feature that allows for the team roster upload, will weigh heavily against them in front of a jury and the courts.

Third, the California Right of Publicity Statute will certainly have to be interpreted in the Keller Controversy. The statute is clear in the protection it provides for the right over an individual's images and likeness. The following paragraphs include a discussion as to how these elements can be applied to the facts that underlie the controversy.

It must first be established whether a party has knowingly used another's name or likeness. EA Sports contends that they have not directly used the student-athletes' names or likeness in developing their videogames. But the previous discussion points in a completely different direction; it seems like EA Sports has gone to great lengths in order to portray an accurate representation of at least the likeness of the student-athletes in the development of the videogames. This would suffice another element of the statute, which expresses that the name or likeness be used in "any manner, on or in products, merchandise, or

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39 Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994).

goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services . . . .”<sup>40</sup>

The next element involves the student-athletes’ consent to the use of their images, and this is certainly debatable in the Keller Controversy. EA Sports contends that the student-athletes waived the rights to their images by signing Form 08-3a and thus consented that the NCAA or a third party could use these images to promote the NCAA championships, activities or programs. But an in depth analysis of this agreement demonstrates that such consent is not expressly given. The clause’s contents are ambiguous and are not negotiable; they place the student-athlete in a vulnerable position. This will be a key factor in the resolution of the Keller Controversy and it could be interpreted both ways, and a jury or the courts, taking into consideration that the agreement is a type of adhesion contract, should give the student-athletes a favorable interpretation.

If it is decided that a party misappropriated another’s image or likeness, then it will be liable for the damages suffered by plaintiffs as a result of their conduct. They would be entitled to the actual damages, if they could be proven, but most important, they could be awarded the profits that resulted from the unauthorized use. In doing so they only have to prove the gross revenue that could be attributed to the use, and, in this case, this amount would be substantial.

Even though there is room for arguments on both sides, the analysis appears to tip the scale in favor of the student-athletes. The interpretation of the California Right of Publicity Statute could be the fundamental base in reaching a solution.

The Keller Controversy takes us to the crux of First Amendment publicity rights controversies. History has shown us that there are no clear-cut standards that can be applied, which makes the decision even more important. Ultimately, balance will be needed and, in order to do so, the judicial system will have to consider all of the factors that have been discussed above. Given the complexity, relevance and the public interest in the Keller Controversy, it might become a perfect opportunity for the United States Supreme Court to interpret these laws and doctrines. After all, it has been thirty-four years since the *Zachinni* decision, and there is collective thirst for a holding that will shed some light on how to approach First Amendment publicity right controversies.

## CONCLUSION

How far is the judicial system willing to go in order to protect one right over another? This is the underlying question in the Keller Controversy, and the courts are going to be forced to either justify the protection that the First Amendment provides or recognize that the right of publicity claim cannot be surmounted in this case. This will prove to be no easy task; there are few guide-

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40 CAL. CIV. CODE § 3344 (a).



lines provided by jurisprudence for the interpretation of these rights, and even those can be conflicting and tough to implement.

The factual background of this case is clear: a student-athlete who wants to participate in an intercollegiate competition must sign Form 08-3a, in which he or she gives up the right to his images while representing a certain college or university. EA Sports in turn gets a license from the CLC that gives them the exclusive rights to develop, manufacture, and distribute videogames that represent intercollegiate events. The problem lies in the degree of likeness that EA Sports has used in this development. The resemblance to real life student-athletes is tough to ignore and most people agree on this fact, but the reality is that it is not that simple to adjudicate the controversy solely on these similarities. The courts must take into consideration the legal policies that have been developed throughout the years.

EA Sports' most realistic chance of justifying their conduct is the student-athlete agreement. Even so, this agreement is ambiguous and it is not clear if the interpretation they seek will be upheld given the circumstances in which the student-athlete must sign the contract. This could probably be solved in the future by providing student-athletes with a more specific agreement, including additional disclaimers or, at least, counseling regarding the consequences of their signature.

Another important aspect of the Keller Controversy is the enactment of the Right of Publicity Statute in the State of California. There is a clear policy that seeks to protect the images and likeness of individuals and, when analyzed in this context, it is forceful to conclude that EA Sports has violated its dispositions. They have taken another person's likeness, at least, without their consent, and used it to obtain economic benefits in doing so. They would have to repair the injuries they caused to the plaintiffs, including a portion of the income generated by the misconduct and even attorneys fees.

The controversy has also captivated the attention of several industries that could be affected by the decision. It could prove to be detrimental to Hollywood if their ability to use images and likeness of individuals in the development of the movie films. For example, to use an actress to portray Marilyn Monroe in a movie film. On the other hand, professional sports players associations would get more leverage in negotiating how they are compensated for the usage of their similar images in videogames sold by EA Sports. This makes it a high profile case and one that should be highly scrutinized by the legal community.

It will always be up to the courts to interpret the laws set forth by the legislative branch, and given the high interest showed by all of the parties, this controversy will be hard fought. This case could ultimately reach the United States Supreme Court, and it would be interesting to see how it would interpret the Right of Publicity Statute in the context of a freedom of speech and publicity rights controversy.